

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION
COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

DOCKET NOS. UG-040640 and
UE-040641 (consolidated)

JOINT PETITION FOR
RECONSIDERATION AND
CLARIFICATION BY PUBLIC
COUNSEL AND ICNU

I. PETITION

1. Pursuant to WAC 480-07-850, Public Counsel and the Industrial Customers of Northwest Utilities (ICNU) (Joint Petitioners) petition for reconsideration of portions of the Commission's Order No. 06 (Order) in this docket which decline to disallow Puget Sound Energy's (PSE's) unreasonable and excessive rate case expenses. Order, ¶¶ 173-176. Petitioners also seek clarification of ¶¶ 170 and 172 regarding amortization, pursuant to WAC 480-07-835.

II. ARGUMENT

A. The Standard For Reconsideration Is Met.

2. The Commission may grant reconsideration of a final order if a party files a request stating the specific grounds upon which relief is requested within ten days of service of the

JOINT PETITION FOR
RECONSIDERATION &
CLARIFICATION BY PUBLIC
COUNSEL & ICNU
DOCKET NOS: UG-040640 &UE-040641
(CONSOLIDATED)

1

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 98164-1012
(206) 464-7744

order.¹ Reconsideration may be granted if the petition identifies portions of the order that are erroneous and incomplete.² The petition must cite those portions of the record and each law or Commission rule that the petitioner relies on to support its petition, and must present brief argument in support of its petition.³ The purpose of a petition for reconsideration is to request the Commission change the outcome regarding one or more issues in the final order.⁴

3. Joint Petitioners are timely filing this Petition for Reconsideration within the time period established by WAC 480-07-850, as noted in the Order.⁵ This petition identifies the portions of the Order regarding rate case expenses that the Joint Petitioners believe are incorrect or incomplete. Based on the record, applicable law, and the arguments in this petition, Joint Petitioners respectfully request that the Commission reconsider the Order on the issue of PSE’s unreasonable and excessive rate case expenses.

B. The Commission Has Authority To Disallow Unreasonable Levels Of Expense Without Any Specific Proposal from A Party; However. ICNU Made A Specific Proposal For Disallowance.

4. The Commission stated in its Order that “no party [made] any specific proposal for disallowance of all or some portion of PSE’s rate case costs incurred in this proceeding,” Order, ¶ 173. The Joint Petitioners ask the Commission to reconsider this conclusion as not accurately reflecting the record. ICNU witness Schoenbeck recommended in his direct testimony that PSE

¹ RCW 34.04.470; WAC 480-07-850(1); *WUTC v. PSE*, UG-040640 et al.(February 18, 2005), Order No. 06 at 96.

² WAC 480-07-850(2).

³ *Id.*

⁴ WAC 480-07-850(1).

⁵ Order, at 96.

5. only be allowed to recover 50% of its outside legal and consulting fees. Ex. 371C, p. 29. Public Counsel supported this recommendation in its brief. Public Counsel Initial Brief, ¶ 119, Reply Brief, ¶ 26. Order No. 06 in fact recognizes this recommendation. Order, ¶ 175.
6. Whether or not a party makes a specific numerical proposal, however, should not be a determining factor on the question of disallowance. PSE has the burden of proof to establish that all costs it seeks to recover are reasonable and prudent. RCW 80.04.130.

“Where the utility seeks a rate increase, the burden is on it to demonstrate that all expenditures were prudent. In any case where another participant ‘creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling those doubts and proving the questioned expenditure to be prudent..’”⁶

The Commission has both the authority and the duty to review the PSE expense request and determine whether it is allowable.

A utility cannot include every expense it wishes in this operating expense category since the regulatory agency has the power to review operating expenses and to disallow those which were not prudently incurred.⁷

The Commission’s power is not limited to simply choosing between recommendations.⁸ Here, ICNU, Public Counsel and Commission Staff all raised concerns about the level of expense. *See e.g.* Public Counsel Initial Brief, ¶119, Reply Brief 26; ICNU Initial Brief, ¶¶ 60-66; Initial Brief of Commission Staff, ¶¶ 140-143. The Commission can review the record and make its own determination as to whether any of PSE’s rate case expenses should be disallowed.

⁶ Goodman, *The Process of Ratemaking*, p. 59, citing *Anaheim, Riverside, etc. v. FERC*, 669 F.2d. 799, 809 (D.C. Cir. 1991).

⁷ *POWER v. WUTC*, 104 Wn. 2d 798, 810, 711 P.2d 319 (1985).

⁸ 64 Am. Jur.2d Public Utilities §185 (regulator not limited to conclusions recommended by parties at the hearing). *Application of Hawaii Electric Light Co., Inc.*, 67 Haw. 425, 429-30, 690 P.2d 274, 278 (1984).

C. There Is An Adequate Record Upon Which To Base A Disallowance Of PSE Rate Case Expense.

1. Record Evidence

7. The Commission found: “no basis in our record upon which to adjust the amount both PSE and Staff recommend be allowed for general rate case expense.” Order, ¶ 176. Joint Petitioners request reconsideration of this finding.
8. The record contains the following evidence upon which the Commission can base a disallowance and calculate its amount:
- Detail regarding PSE’s actual expenditure levels for this case on outside counsel legal fees, specific expert witnesses, and issues, totaling \$2.318 million through December 10, 2004. Exs. 247C, pp. 4-6, 249C.⁹
 - PSE’s May 2003 Legal Budget Analysis, including specific dollar amounts for comparing the average hourly rate expense of house and outside counsel, and PSE’s ratio of house to outside counsel expense, compared with the national average. Story Rebuttal Ex. 240C, pp. 34, 41, 43; Ex. 384, p. 11, 20, 22 (same exhibit, Schoenbeck); Ex. 371, pp. 28-29.
 - The actual levels of expenditure by Public Counsel and Staff for their cost of capital witnesses (\$20,000 and \$50,000 respectively), Tr. 495:1 - 496:8 (Hill); Tr. 575:15-25 (Wilson).
 - Testimony regarding PSE witness Dr. Cicchetti’s billing rate (\$475 per hour), Tr. 296:19 and Mr. Hill’s billing rate (\$150 per hour), Tr. 493:12-13, and Dr. Wilson’s rate (\$250 per hour). Tr. 548:4.

⁹ The summary pages of these two exhibits are not confidential.

- Testimony that PSE’s expenditure for cost of capital testimony in this case was not reasonable based upon average charges by industry cost of capital witnesses, normally two to three times the charge of public advocate witnesses. Tr. 495:1-496:8 (Hill).
- Payment of \$580,319 to an outside consultant, James Heidell of PA Consulting, who was formerly an employee of PSE. Ex. 249C; ICNU Initial Brief, ¶ 63.
- Pre-filed testimony of ICNU. Ex. 371, pp. 27-31 (Schoenbeck).
- The Commission’s finding that “[Dr. Cicchetti’s] results ... are ‘essentially meaningless’ and ‘are not credible.’ [footnote omitted]. We find that we can give little or no weight to Dr. Cicchetti’s DCF analysis or results.” Order, ¶ 51.
- The Commission’s conclusion that “[g]iven that we accord little weight to Dr. Cicchetti’s DCF results, his CAPM [capital asset pricing model] and Risk Premium analysis stand for very little. Moreover, we find the criticisms leveled at those analyses, as performed by Dr. Cicchetti, also have merit. We find we should give little weight to the results Dr. Cicchetti reports on the basis of his CAPM and Risk Premium analysis.” Order, ¶ 58.
- The Commission’s conclusion that “[i]n summary, we focus on the DCF analyses presented by Dr. Wilson and Mr. Hill as the most substantial and reliable evidence of PSE’s cost of equity capital at this time.” Order, ¶ 73.

//

///

2. Outside Counsel and Expert Witness Costs

9. In PSE's last fully litigated rate case in 1992 the Commission stated:

The Commission is very concerned about the high level of litigation expenses on this case, both for legal counsel and for expert witnesses [.]

* * *

The Commission urges the company to follow-up the Towers Perrin study recommendation to evaluate use of in-house legal counsel to control costs.¹⁰

10. Beyond the sheer magnitude of outside counsel fees, \$770,000 for the 2004 rate case alone, the Commission's prior admonition and direction regarding PSE's legal costs, and the company's own 2003 internal review, provide an adequate basis for the Commission to conclude on the record that PSE's legal expenses are excessive. There is evidence in the record, from the company's own internal analysis, upon which to basis a specific disallowance calculation. PSE's legal expenses for the rate case should be limited to the fees that would result from an internal/external mix at the national average level, using PSE's actual hourly costs.

Alternatively, the outside legal fees could be limited to the national average hourly rate. Either would result in a more reasonable level than that sought by the company.

11. Public Counsel argued on brief that Dr. Cicchetti's fees were excessive, given their absolute level, the technical flaws in his testimony, and his lack of credibility. Public Counsel Initial Brief, ¶ 103. In its final order, the Commission agreed with Public Counsel's assessment of the quality of the testimony, finding Dr. Cicchetti's cost of capital testimony to be "essentially meaningless," to lack credibility, and to be worthy of little or no weight. Order, ¶¶ 51, 58.

12. In light of these findings, there is a clear basis for disallowing all or at least a portion of Dr. Cicchetti's fee (see also discussion below). Public Counsel and ICNU recommend disallowance of all PSE's expenses for cost of capital testimony. The record contains alternative

¹⁰ *WUTC v. Puget Sound Power & Light*, UE-921262 et al., Eleventh Supplemental Order, pp. 68-69 (PSE 1992 rate case).

measures for calculating the amount of a partial disallowance.¹¹ The Commission could limit recovery of Dr. Cicchetti's fee to a level equal to the average of Mr. Hill's and Dr. Wilson's fee for the case.¹² Alternatively, based on Mr. Hill's testimony of standard billing differentials, the Commission could limit the fee to an amount in the range of two to three times the average of the fee charged by Messrs. Hill and Wilson.¹³

13. The Joint Petitioners believe the record contains both a substantive basis for and a reasonable means to calculate an appropriate level of disallowance of PSE's excessive rate case costs in this docket.

D. There Is A Sound Legal Basis For Disallowing PSE's Rate Case Expense In This Docket.

14. Utility company expenses for testimony, exhibits, legal fees, and expert witness costs, are recoverable when reasonable and necessary.¹⁴ Utility companies, however, do not possess an unrestricted right to recover rate case expenses. "Consumers should not be forced to pay for 'elaborate defenses of private interest.'"¹⁵ The level of expense in this docket could well be termed "elaborate."

15. It is well-recognized that rate case expense recovery may be denied not only when costs are excessive, but also when the company's position has no merit, and proposed rates have not

¹¹ Dr. Cicchetti's firm's fee for the cost of capital testimony was \$374,160 as of October 2004. Ex. 249C (original). Total fees for Pacific Economics Group (Drs. Cicchetti and Dubin) totaled \$496,757 as of that date. Upon request at the hearing, PSE provided updated figures as of December 10, 2004. Exs. 247C, 249C (updated). The update showed a new total for Pacific Economics Group of \$647,703. The update of 249C does not show the separate statement of the cost of capital expense contained in the original. Ex. 247C, however, contains the invoices from which the separate cost could be determined.

¹² Mr. Hill's fee (\$20,000) and Dr. Wilson's (\$50,000) yield an average of \$35,000. Dr. Cicchetti's total fee appears to be at least 20 times that of Mr. Hill and approximately 10 times that of Dr. Wilson.

¹³ This would yield an allowed fee of \$70,000 to \$105,000.

¹⁴ Charles F. Phillips, Jr., *The Regulation of Public Utilities*, Third Ed., p. 261 (1993).

¹⁵ *Id.*

been justified:

[I]f there is reason to believe that the expenses incurred were either excessive or unnecessary, the courts as well as commissions generally have held such items to be below-the-line deductions. According to the North Carolina Public Service Commission, “although rate costs should be amortized to expenses when a proposed rate increase is approved, when a rate increase is not justified, and there is no merit in the request, the stockholders, and not the ratepayers, should bear the cost of the proceedings.” [footnote omitted]. Likewise, the Kentucky Public Service Commission said: ‘Rate case expenses should be borne by the stockholders rather than the rate payers where the proposed rates have not been justified and there is no merit to a request for a rate increase, *particularly where claimed rate case expenses are completely out of proportion with the other factors in the case.*’¹⁶

In this case, this principle is particularly applicable to the question of Dr. Cicchetti’s fees. As discussed above, the Commission has found that his testimony was not credible or useful to the Commission in making its decision on the issue of cost of capital, perhaps the most significant issue in the proceeding. Instead, the Commission relied on the testimony of the Staff and Public Counsel expert witnesses.

16. In PSE’s 1992 rate case the Commission disallowed recovery of fees for two company cost of capital witnesses from bond rating and investment agencies, finding that “these witnesses represented the interests of company shareholders, not the ratepayers.”¹⁷ The Commission also noted that it had previously “disallowed costs for consultants deemed not appropriate for ratemaking purposes.”¹⁸

17. Simply put, PSE’s Washington ratepayers should not be required to pay the company in excess of \$400,000 for testimony found to be “essentially meaningless” and “not credible.” Order, ¶ 51. The substantial portion of PSE’s rate increase request which was based upon Dr.

¹⁶ Suelflow, *Public Utility Accounting: Theory and Application* (1973), p. 75 (emphasis added); Phillips, pp. 261-262 (“[E]xpenses for a rate increase that has no merit...are generally not included in operating expenses”).

¹⁷ PSE 1992 Rate Case, Eleventh Supplemental Order, p. 68.

¹⁸ *Id.*

Cicchetti’s testimony was “not justified” and had “no merit.”¹⁹ The cost of presenting that testimony should be borne by the stockholders, not PSE’s customers.

E. The Commission Should Clarify The Mechanism For Collecting Deferred Accounts.

18. The Order concludes that PSE must amortize deferred rate case expenses over three years without being allowed to earn a return on the balance. Order, ¶ 107. In addition, the Commission determined that “[g]oing forward, PSE will recover the costs it incurs in prosecuting rate cases as a normalized expense.” Order, ¶ 172.

19. The Order does not specify the mechanism by which the deferred amounts will be collected from ratepayers. If PSE amortizes the deferred balance by an increase in base rates, then PSE would over-recover costs once the balance has been amortized. The potential over-recovery could be remedied in two ways. First, PSE could amortize the balance by collecting a surcharge that ceases once the balance has been fully amortized. Second, PSE could be required to create a deferred account once the balance has been amortized to defer excess collections for later refund to customers. Joint Petitioners respectfully request that the Commission clarify the appropriate method for collecting the amortized balance to avoid over-collection by PSE.

III. CONCLUSION

20. For the foregoing reasons, Public Counsel and ICNU respectfully request: (1) that the Commission reconsider ¶¶ 173-176 of Order No. 06 and disallow PSE’s excessive and unnecessary rate case expenses, using the information available to it in the record; (2) that the

¹⁹ Suelflow, p. 75.

Commission clarify the appropriate method of collecting the amortized balance of allowed rate case expense to avoid over-recovery.

DATED this 28th day of February, 2005.

Respectfully Submitted,

ROBERT McKENNA
Attorney General

Respectfully Submitted,

DAVISON VAN CLEVE, PC

Simon J. ffitc
Assistant Attorney General
Section Chief
Public Counsel
900 Fourth Avenue Suite, Suite 2000
Seattle, WA 98164-1012
(206) 389-2055 Telephone
(206) 389-2079 facsimile
simonf@atg.wa.gov

S. Bradley Van Cleve
Davison Van Cleve, P.C.
333 SW Taylor, Suite 400
Portland, Oregon 97204
(503) 241-7242 Telephone
(503) 241-8160 facsimile
mail@dvclaw.com
Of Attorneys for Industrial Customers of
Northwest Utilities